

In the Matter of License No. A-29241
Issued to: MAURICE C. NELSON

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

579

MAURICE C. NELSON

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations Sec. 137.11-1.

On 30 July, 1951, an Examiner of the United States Coast Guard at New York City suspended License No. A-29241 issued to Maurice C. Nelson upon finding him guilty of negligence based upon a specification alleging in substance that while serving as operator on board the American Motorboat 10 F 469 (MISS INDIAN POINT III) under authority of the document above described, on or about 10 June, 1951, while said motorboat was in the vicinity of Indian Point Park, Buchanan, New York, and having on board eight passengers, he approached the old Day Line Pier "at a speed of about twenty-seven miles per hour, on an unsafe course, resulting in the Motorboat colliding with the pier and injuries being sustained by the passengers on board."

At the hearing, Appellant was given a full explanation of the nature of the proceedings, the rights to which he was entitled and the possible results of the hearing. Appellant was represented by an attorney of his own selection and he entered a plea of "not guilty" to the charge and specification proffered against him.

Thereupon, the Investigating Officer made his opening statement and introduced in evidence the testimony of three witnesses, two of whom were passengers aboard Appellant's boat.

Counsel for Appellant then moved to dismiss the charge and specification on the ground that the evidence did not sustain the specification. After argument by both parties, the Examiner found that a prima facie case had been established and he denied the motion.

In defense, Appellant offered in evidence the testimony of six witnesses in addition to his own testimony which was taken under oath.

During the course of the hearing, several documentary exhibits were introduced and certain stipulations were entered into by the opposing parties. It was stipulated that the Day Line pier was 109 feet long, the Nelson pier was 46 feet long, the distance between the two piers was 149 feet, and that the boat struck about eight feet from the outer end of the Day Line pier injuring all of the passengers.

At the conclusion of the hearing, having heard the arguments of the Investigating Officer and Appellant's counsel and given both parties an opportunity to submit proposed findings and conclusions, the Examiner announced his findings and concluded that the charge had been proved by proof of the specification. He then entered the order suspending Appellant's License No. A-29241, and all other licenses, certificates of service and documents issued to this Appellant by the United States Coast Guard or its predecessor authority, for a period of six months on twelve months probation.

From that order, this appeal has been taken, and it is urged in seventeen exceptions to the Examiner's decision that the facts developed at the hearing do not support the charge and specification or the findings and conclusion of the Examiner; that the decision of the Examiner is contrary to the law; that the testimony of the Investigating Officer's witnesses is incredible; and that some of the statements made by the Examiner in his decision are grossly in error. In the supporting brief, Appellant contends that the occurrence of an accident does not prove

negligence and the evidence leaves no question but that the proximate cause of the accident was an unforeseeable disturbance in the water rather than the speed and course of the speedboat (Point I); and that the preponderance of credible evidence does not support the findings of the Examiner since the testimony of all the Investigating Officer's witnesses was colored by their desire to aid their personal injury actions against Appellant by proving that he was negligent and the testimony of the latter witnesses was incoherent and contradictory as opposed to the clear and concise testimony of Appellant and his disinterested witnesses.

APPEARANCES: Messrs. Bigham, Englar, Jones and Houston, of New York City, by John L. Quinlan and John J. Martin, Esquires, of Counsel.

Based upon my examination of the record submitted, I hereby make the following

FINDINGS OF FACT

At approximately 1630 on 10 June, 1951, Appellant was serving as operator on board the American Motorboat 10 F 469 (MISS INDIAN POINT III) and acting under authority of his License No. A-29241 while said Motorboat was carrying eight passengers for hire on the Hudson River in the vicinity of Indian Point Park, Buchanan, New York. Appellant and his brother held the concession for pleasure boat rides adjacent to the amusement park at Indian Point and the passengers with Appellant were participating in such a ride when the accident in question occurred.

In the area involved in this case, the Hudson River extends generally in a northerly and southerly direction. On the east shore of the river, the Nelson brothers maintained a small pier or float which extended out forty-six feet from the concrete bulkhead which was built up along the shoreline. One hundred and forty-nine feet upstream and to the north of the Nelson pier was the Hudson River Day Line pier which extended out into the river for a distance of one hundred and nine feet. There were ships in a reserve fleet anchorage area which was on the opposite side of the river from the above two piers.

Nearing the completion of this particular trip, Appellant

navigated MISS INDIAN POINT III towards the east shore on a wide circular course so that she was headed upstream and on a course substantially parallel to the shoreline when she passed within about twenty feet of the Nelson pier at a speed of approximately twenty-seven miles per hour. When just past the small pier, Appellant put the rudder left in order to carry out the maneuver necessary to avoid the longer Day Line pier. The boat commenced a gradual swing away from the shoreline but when she was about fifty to seventy-five feet beyond the small pier, her bow was caught in swells two feet high which were caused by the converging wash of two or more vessels in the vicinity. Despite hard left rudder, the swells prevented the boat from turning to port as her bow was forced to starboard and she was straightened out to such an extent that her starboard bow crashed against the pilings located eight feet from the outer end of the Day Line pier about two or two and a half seconds after the swells had begun to affect the course of the motorboat. All of the passengers were injured and considerable damage was done to the motorboat.

Appellant was aware of other traffic on the river and he observed that the otherwise smooth water was rough between the two piers due to the wash from these other vessels but he did not at any time attempt to reduce the speed of his boat or set a course to allow for a wider clearance than usual. Appellant had carried passengers over substantially the same course on approximately 30,000 trips during the past twenty years without having an accident.

OPINION

Since one of the two major points raised in this appeal is that the credible evidence is not sufficient upon which to find that Appellant was negligent as charged in the specification, my findings of fact are based upon an unusually careful review of the record.

It is contended that the testimony of Investigating Officer's witnesses should be given little weight because they were interested parties and also because their testimony was incoherent and contradictory as to the course and speed of the motorboat as well as because they testified that they had seen no other boats on the river. The significance of the latter point in itself is not

important since the Examiner found that there were other boats in the vicinity. The Examiner also adopted the testimony of Appellant as to the speed of his boat rather than finding in accordance with the apparently excessive estimates of the Investigating Officer's witnesses who admittedly had never before attempted to judge the speed of a boat. Concerning the course of the motorboat, there was some variation in the estimates given by the Investigating Officer's witnesses but there were no great discrepancies. Their testimony on this point was substantially the same as that of the other witnesses. Most of the witnesses gave poor estimates as to certain distances but this was cleared up by stipulations based on actual measurements upon which the Examiner based his findings. Since no other specific instances have been mentioned in which it is claimed that the testimony of the witnesses of the Investigating Officer was incoherent and contradictory and in the absence of clear error, it is not necessary to comment further upon this blanket exception to their testimony.

Where there were discrepancies between the testimony of the Investigating Officer's witnesses and those appearing in Appellant's behalf, the Examiner generally found in accordance with the testimony of the latter group of witnesses with one exception. And in order to present the case in the most favorable light to Appellant's interest, I have found (in agreement with the testimony of the Appellant) that the gradual left turn was begun as soon as the boat had passed the Nelson pier rather than that it was not commenced until the motorboat was approximately halfway distant between the two piers (as was found by the Examiner). There is no other basic difference between my findings of fact and those of the Examiner; and these findings are based upon substantial evidence in accordance with the above comments.

Appellant's other major contention is that this was an inevitable accident caused by an "act of God." Appellant seems to present a somewhat paradoxical argument. He emphatically states and reiterates that he has made 30,000 trips over this identical course without a single accident "in all kinds of weather and under all types of sea conditions" but that neither Appellant nor his brother "had ever experienced a similar water disturbance" such as the "unusual, unanticipated and unforeseeable water disturbance which Maurice Nelson encountered on June 10th * * *." It is urged that the proximate cause of the accident was Appellant's inability to turn his boat due to this unpredictable water condition which

was beyond his control and that, therefore, the situation comes within the law of the cases which state that there is no negligence when a casualty occurs as the result of an unusually large wave which could not reasonably have been anticipated. But in the present case, it appears unlikely that Appellant could have run over the same course many times under exactly the same conditions without having the same thing happen as occurred in this case, as well as it is difficult to say that Appellant was not negligent on this occasion rather than that he was lucky it had not happened before this time. He knew that there were other boats in the vicinity and that their wash was causing heavy swells to run between the piers. Since he saw this water action but continued to run his boat into it because he did not anticipate the effect it would have, this situation does not fall within the category of cases where a sudden, unanticipated "act of God" caused the damage. The following statement was made in the case of *The Mendocino* (D.C., E.D.La., 1929), 34 F.2d 783:

"Nor can the defense [of inevitable accident] be maintained if she voluntarily put herself in a situation where she receives the effect of natural forces, the result of which should have been foreseen and might reasonably have been anticipated."

Even assuming that the disturbance in the water could only be blamed on God (although the swells were brought about by passing vessels) and regardless of what was the proximate cause of the accident, Appellant's intervening act of entering the rough water contributed to the ultimate result. A person is not relieved of liability for a casualty directly attributable to an "act of God" which could have been avoided.

It is conceded that the test of negligence is not the result which occurred, but whether Appellant possessed and exercised a reasonable degree of skill and judgment under the circumstances. It is not questioned that Appellant possessed and exercised a reasonable degree of skill or that he possessed a reasonable degree of judgment. But a higher duty of care than is usually required was imposed upon Appellant in operating his boat with passengers for hire aboard. *Black v. (The Nereid (D.C.N.J., 1941), 40 Fed. Supp. 736.* Under these circumstances, I do not think that he exercised the reasonable judgment required of an ordinarily prudent

man of this calling when Appellant continued into the swells at the rate of slightly less than forty feet per second, especially since a large pier was 149 feet dead ahead and protruding into the water about forty feet beyond Appellant's projected course line at the time his boat passed the small pier. The time and area for maneuvering was greatly restricted. Appellant's past performance is not the criterion by which to judge what the average prudent man would do under similar circumstances. For these reasons, it is my opinion that Appellant's contributory action was negligence. The negligence is not based upon any unpreparedness when sudden swells approached the boat but the deliberate act of Appellant in heading into the rough water when he had the choice of taking a perfectly safe course.

Appellant's boat sheered into a stationary object. When a moving vessel runs into a lawfully moored or anchored vessel, the presumptions are all against the moving vessel and she is presumed at fault unless she exonerates herself. *The Mendocino*, supra.

CONCLUSION

Since the prima facie case made out against Appellant was not overcome by the evidence of his prior experience in the vicinity of the accident or by other matters in defense, the order of the Examiner will be sustained.

ORDER

The Order of the Examiner dated 30 July, 1951, should be, and it is, AFFIRMED.

Merlin O'Neill
Vice Admiral, United States Coast Guard
Commandant

Dated at Washington, D. C., this 31st day of July, 1952.

***** END OF DECISION NO. 579 *****

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